SUPREME COURT U. S.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-5488

UNITED STATES OF AMERICA,

Appellee,

—v.—

GANDALFO ALBANESE,

Petitioner-Appellant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Statutes Involved

18 U.S.C. Section 841 Principals

(a) Whosoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. Section 371 Conspiracy to Commit an Offense or to Defraud the United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years or both.

21 U.S.C. Section 841 Prohibited Acts A—Unlawful Acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense or possess with intent to manufacture, distribute or dispense a controlled substance.

IN THE

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No. .....

UNITED STATES OF AMERICA,

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—v.—

GANDALFO ALBANESE,

Petitioner-Appellant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Preliminary Statement

This is a petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit which affirmed without opinion on August 25, 1975 a judgment of the United States District Court for the Eastern District of New York entered on April 4, 1975 convicting petitioner after a jury trial, of three counts in an indictment charging him with conspiracy to distribute and thereafter distributing on two occasions heroin in violation of Title 21, United States Code, Section 841(a)(1) and 846 and Title 18, United States Code, Section 2. Petitioner was sentenced to a term of nine years on each of the three counts in the indictment, these terms to run concurrently. In addition, a special parole term of six years was imposed (Judd, *D.J.*).

Statement of Questions Involved

1. Whether, a Special Attorney of the Department of Justice organized Crime Strike Force was entitled to appear before the Grand Jury that returned an Indictment against petitioner?

2. Whether, the evidence adduced at trial was sufficient to sustain petitioner's convictions as to the substantive counts?

3. Whether, error committed within the trial court's instructions to the jury was so prejudicial as to require a new trial?

4. Whether, petitioner who was sentenced without a pre-sentence report must be physically present for any reconsideration of his sentence upon completion of said report?

Jurisdiction

The judgment of the Court of Appeals was made and entered on August 25, 1975. The jurisdiction of this Court is invoked pursuant to Title 28, U.S.C., Section 1254(1) [Petitioner's EX-A].

Statement of Facts

The defendant had been jointly indicted with Jerry Battiloro, Stephen Goronsky, Frank DuBois and Nicholas Gregoris. Upon the trial the defendant Frank DuBois testified for the Government. It was never claimed by the Government that defendants Battiloro and Goronsky were acquainted with the defendant herein. Gregoris is presently awaiting trial.

The Government's Case:

Nicholas Alleva an undercover agent of the Drug Enforcement Administration testified that in the Spring of 1974 pretending to be interested in purchasing narcotics he had a meeting with Jerry Battiloro and Stephen Goronsky. He was provided with a sample of heroin (Tr. 19-20).*

Agent Alleva agreed to purchase an eighth of a kilogram of heroin for $5,300.00 from Battiloro and Goronsky in April, 1974.

In May of 1974 Agent Alleva negotiated a purchase of a quarter of a kilogram of heroin for $10,600.00 from Battiloro and Goronsky (Tr. 26-28).

On May 14, 1974 an agreement was reached amongst the parties for the delivery of a half kilogram of heroin for approximately $21,000.00. After delivery Battiloro and Goronsky were placed under arrest (Tr. 32-35).

Frank DuBois testified that he had been approached by Battiloro "to make a connection for him to purchase heroin" in the Spring of 1973 (Tr. 65). According to the witness he declined the offer. In the Spring of 1974 Battiloro again contacted DuBois for the same purpose. At this time DuBois was interested. He introduced Battiloro to an individual identified in the record as "Vinnie," in an effort to obtain narcotics. However, the effort proved fruitless (Tr. 67-68).

According to DuBois approximately a week after the "Vinnie" meeting he contacted the defendant Albanese who allegedly made further inquiries and reported back to DuBois a day or two later (Tr. 69-70).

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* "Tr." references are to the trial transcript; "A." references are to Appellant's Appendix submitted in the Court below.

The defendant allegedly informed DuBois that the price for an eighth of a kilogram of heroin would be $4,500.00 (Tr. 70).

According to the witness he obtained three deliveries of heroin from the defendant. He in turn gave them to Battiloro and Goronsky returning with the purchase price for each transaction to the defendant except for the final transaction.

DuBois appeared in court for Battiloro's and Goronsky's arraignment at which time he also was arrested (Tr. 82-83). Shortly after his arrest DuBois decided to cooperate with the Government (Tr. 84). In early May, 1974 wearing a Kel-transmitter DuBois went to a butcher shop on Christie Street in New York City owned by the defendant. According to DuBois the defendant demanded the money from the final transaction inasmuch as his suppliers were demanding payment from him (Tr. 84). Although DuBois was equipped to transmit the conversation he had on this occasion, because of an alleged malfunction, the conversation went unrecorded. Another meeting was agreed upon for June 3, 1974 at Bill's Bar. On June 3, 1974 DuBois again wearing a recording device allegedly met the defendant Albanese (Tr. 85-86).

The ensuing conversation which DuBois testified was with the defendant Albanese concerning a variety of subjects including narcotics was electronically recorded. The recording was played for the jury (Gov't's Exhibit 6 in Evidence) (Tr. 93-136).

Suffice it to say that the taped conversation dealt in major part with unpaid monies for narcotics; Battiloro and Goronsky and the fear the defendant and DuBois each shared of unidentified persons if "they were not paid their money."

Only the witness DuBois was able to testify that the voice on the tape was in fact that of the defendant.

POINT I

The Special Attorney of the Department of Justice organized Crime Strike Force was not entitled to appear before the Grand Jury that returned the indictment herein against petitioner.

The petitioner here, as did, *In re Grand Jury Subpoena, of Alphonese Persico* United States Court of Appeals for the Second Circuit, No. 880—Sept. Term, 1974 decided June 19, 1975 argued in the District Court before District Judge Orren G. Judd as well as in the Court below that the Special Attorney hereinabove alluded to was without the requisite authority to appear in the Grand Jury in connection with procuring an indictment.

Although the Court below affirmed petitioner's conviction without written opinion an exhaustive opinion was written by District Judge Weinstein of the United States District Court for the Eastern District of New York, sitting by designation in the *Persico* case *supra.* The legal arguments of *Persico* of course appertain to petitioner as outlined in Judge Weinstein's opinion in that case and need not be repeated here. Judge Weinsteins' opinion in *Persico* renders it abundantly clear that the question at issue is of such monumental importance to the orderly administration of the Federal Criminal Justice System in this country to the full attention of this tribunal is imperative. There is, of course, a real distinction between a *Subpoena* styled proceeding as in *Persico* and the instant case where criminal charges were presented to a Grand Jury. Petitioner assures this Court that he will be prepared to proceed simultaneous with the *Persico* appeal if Certiorari were granted in that case or any other related case on the docket of this Court.

POINT II

The Government failed to establish beyond a reasonable doubt the Petitioner's Guilt as to the substantive Counts in the Indictment. He is entitled to a new trial as to the Conspiracy Count in the interest of justice.

As we view the evidence in the light most favorable to the Government the Government it is urged utterly failed to prove direct contact and connivance between the petitioner and the retailers.

Admittedly, even though a supplier and his retailers do not directly conspire with each other if they have reason to know that other retailers may be involved and have reason to believe that their own benefits derive from the operation and are probably dependent upon the success of the entire venture, a jury may find that each had, in effect, agreed to participate in the over-all scheme. See, *Blumenthal* v. *United States*, 332 U.S. 539, 557-558 (1947); *United States* v. *Friedman*, 445 F.2d 1076, 1080 (9th Cir. 1971); *Daily* v. *United States*, 282 F.2d 818 at 820 (9th Cir. 1960).

This would be true even though the individual defendants were not aware of the identity, number or location of the other participating retailers. See *United States* v. *Friedman*, 445 F.2d at 1080.

In applying these principles, however, it is vital to avoid confusing the similar purposes of numerous separate adventures of like character, with the single purpose of one over-all scheme. *Rocha* v. *United States*, 288 F.2d 545, 553 (9th Cir. 1961), quoting from *Cannella* v. *United States*, 157 F.2d 470, 476-477 (9th Cir. 1946). Under such circumstances the Government had the burden connecting the

defendant Albanese directly or circumstantially with the larger over-all scheme. *Daily,* 282 F.2d at 821-822.

In this case the most the Government proved through DuBois was that he had made a purchase from Albanese of alleged narcotics. There is absent a scintilla of evidence that what DuBois received from Albanese was the narcotics that the agent testified that he had purchased from the defendants Battiloro and Goronsky.

Defendants Goronsky and Battiloro could have had other suppliers. There is no proof directly or circumstantially linking as it must, the defendant Albanese and the Government undercover agent Alleva, the purchaser. The erudite trial Court indicated grave misgivings concerning the submission of the substantive counts in the indictment. However, after extended colloquy the Court reluctantly concluded that "it is a question of the weight of circumstantial evidence" and submitted the substantive counts along with the conspiracy count for jury consideration (9a-15a). The ensuing convictions on all three counts then followed. We submit that the Court erred in this regard.

There was testimony adduced at trial during the period at issue a heroin dealer named "Vinnie" had complained that Battiloro and Goronsky "were his customers" (14a). Unquestionably the testimony of defendants Battiloro and Goronsky was indispensable in order to establish the circumstantial nexus connecting the DuBois-Albanese transaction (if such testimony was in fact available) to Agent Alleva's purchases. This is clearly the case since DuBois was not able to link that which he received from Albanese to that which was delivered to the agent out of his presence. This testimony was not forthcoming and, thus, the Government has utterly failed by omission to met their burden. We may go one step further and categorically state that the record is utterly devoid of even "hearsay" evidence to justify

the submission of the substantive counts of the indictment. This case is unlike *United States* v. *Cianchetti,* 315 F.2d 584 (2d Cir. 1963); *United States* v. *Agueci,* 310 F.2d 817 (2d Cir. 1962) where all the conspirators were shown to know the extent of the scheme and the existence or identity of most or all of the other conspirators. See, also, *United States* v. *Stromberg,* 268 F.2d 256 (2d Cir. 1959). Relevant to the defendants Seto and DeSaverio.

The prejudicial overflow to the conspiracy count within the indictment is unmistakable. Serious consideration must be given to the concurrent sentence rule, as set forth in *Benton* v. *Maryland,* 395 U.S. 784, 89 S.Ct. 2056, 23 L. Ed. 2d 707 (1969). The fact that there were concurrent terms of imprisonment in this case does not justify sustaining the conspiracy conviction. If as we submit that the substantive counts within the indictment were erroneously submitted to the jury the defendant is entitled to a new trial as to the conspiracy count in the interest of fundamental justice since the jury patently considered all three counts as an entity by their verdict convicting on two counts where there was no supportive evidence. In sum in order to sustain the substantive convictions in this case it must be assumed that Albanese was the only possible supplier which is manifestly absurd.

POINT III

The Court committed inadvertent, but irretrievably prejudicial error within its charge to the jury.

The Court instructed the jury as follows:

> "Mr. Rosenkrantz, pointed out it is possible the heroin which Battiloro and Goronsky sold to Agent Alleva was something that they got from another heroin dealer or that the packages that were analyzed by the chemists were not in fact the packages that Mr. Albanese delivered to Mr. DuBois. You can determine from the evidence whether this leaves you with any reasonable doubt that the heroin that was purchased by the agent did in fact come from Mr. Albanese" (36a).

The Court unwittingly informed the jury of a side bar colloquy where counsel argued against the submission of the substantive counts to the jury (9a-11a).

Counsel duly noted his exception to this portion of the Court's instructions to the jury:

> "Mr. Rosenkrantz: I would specifically except to your Honor's charge in which your Honor indicated to the jury that it was my argument that Mr. Albanese may have delivered heroin to Mr. DuBois but that this was not the same heroin that Battiloro and Goronsky were alleged to have received. *I did not make that argument before the jury. I made that argument—that was a legal argument presented to the Court out of the presence of the jury, and I at no time conceded to the jury*" (41a-42a).

Of course, this instruction as given was a usurption of the jury's fact finding province.

In light of counsel's strenuous objections the Court was compelled to recall the jury and advise them accordingly i.e. "that the *defendant* does not concede that any packages were delivered to Mr. DuBois by Mr. Albanese. That's for you to determine on the basis of all the evidence in the case" (43a).

As given the further instruction was ineffectual, and indeed intensified the error. In the first instance the Court should have informed the jury that it has been mistaken—not that the defendant does not concede—thereby leaving the jury with the single inference to be drawn which is that the Court was constrained by actions of the defendant in their absence to alter it, the Court's considered charge and view of the evidence.

In light of this instruction it astounds the writer that the jury deliberated the event even the short period it did before convicting the defendant on all counts in the indictment. It is conceded that, the error here was one of inadvertence. However, coming as it did at the very threshold of the jury's deliberations, it would be unreasonable to conclude the error to be harmless or cured by the additional instructions which the jury had to be aware was forthcoming at the instigation of the defense.

POINT IV

The petitioner is entitled to be resentenced and to be Physically Present.

The petitioner in this case was sentenced without the benefit of a pre-sentence report. It is true that the trial Court did indicate it would entertain a Rule 35 motion for reduction of sentence after "Appeals are effected." The allocution proceeding in this case conducted as it was without the benefit of a pre-sentence report was an empty gesture. Whether, Judge Judd will be influenced to either let stand or to reduce petitioner's sentence such decision will be based on the pre-sentence report. Only petitioner is in a position to challenge any inaccuracies within such a report. This has physical presence as indispensable to due process of law.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A—ORDER

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 25th day of August, one thousand nine hundred and seventy-five.

Present:

Honorable James L. Oakes,
Honorable Ellsworth A. Van Graafeiland,
Honorable Thomas J. Meskill,
Circuit Judges.

No. 75-1159

UNITED STATES OF AMERICA,

Appellee,

—v.—

GANDALFO ALBANESE,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

JAMES L. OAKES
ELLSWORTH VAN GRAAFEILAND
THOMAS J. MESKILL
U.S. Circuit Judges

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-5488

GANDALFO ALBANESE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner challenges the right of an Organized Crime Strike Force attorney to appear before a grand jury, the sufficiency of the evidence to sustain petitioner's conviction of the substantive offenses charged, the correctness of the court's instructions, and the propriety of sentencing petitioner without a pre-sentence report.

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on all three counts of an indictment charging him and four co-defendants with conspiracy to distribute and possess heroin, and two substantive acts of distributing heroin, in violation of 21 U.S.C. 846 and 841(a)(1).[1] Petitioner was sentenced to concurrent terms of nine years' imprisonment

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[1]Co-defendants Battiloro, Goronsky, and DuBois pleaded guilty; co-defendant DuBois testified for the government; co-defendant Gregoris was a fugitive at the time of trial.

on each count, to be followed by a six-year term of special parole. The court of appeals affirmed without opinion (Pet. App. A; 519 F. 2d 1397).[2]

The evidence showed that in April 1974, DuBois went to petitioner's Manhattan butcher shop where he asked petitioner, whom he knew well, if he could supply heroin for two old friends, Battiloro and Goronsky, explaining that Goronsky had been his son's partner. On a second visit by DuBois about two days later, petitioner said that he could obtain an eighth of a kilo for $4,500. DuBois relayed this offer to Battiloro and Goronsky, who accepted it. Petitioner told DuBois that the first delivery would have to be through DuBois, after which they would "play it by ear" (Tr. 69-74).

On April 24, 1974, undercover narcotics agent Alleva arranged with Battiloro and Goronsky for the purchase of an eighth of a kilo of heroin for $5,300. After testing a sample, which proved to be heroin, the agent confirmed the agreement (Tr. 18-23), and met Battiloro in an apartment in Brooklyn, where Goronsky opened the door and Battiloro delivered the heroin. At the agent's direction, Goronsky drove him to another address, where he obtained the money and paid Goronsky (Tr. 23-25). On the following morning, Battiloro paid DuBois, who in turn paid petitioner (Tr. 75).

On the evening of May 7, the agent met Battiloro in Brooklyn and arranged for delivery of a quarter kilo of heroin for $10,600. A surveilling agent observed the transfer of a package from DuBois' car to Battiloro's car, following which, in the early morning hours of May 8,

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[2]"Pet. App." refers to the appendix to the petition for a writ of certiorari; "Tr." to the trial transcript; and "App." to the appendix in the court below, which we are lodging with the Clerk.

Battiloro and Goronsky delivered a quarter kilo of heroin at a Brooklyn apartment and thereafter received the promised $10,600 (Tr. 27-30, 178). Battiloro paid DuBois and, on the following day, DuBois paid petitioner (Tr. 80).

A third heroin transaction between the same parties, but this time taking place in the Southern District of New York, was aborted on May 14, 1974, by the arrest of Battiloro and Goronsky and seizure of the narcotics. The involvement of DuBois was thereafter discovered. He was arrested and agreed to cooperate with the government (Tr. 31-34, 80-84).

On May 31, 1974, DuBois, wearing a transmitter, which failed to function, visited petitioner's butcher shop. Petitioner threatened DuBois with dire consequences unless arrangements were made for payment for the narcotics lost in the May 14, transaction; a further meeting was planned for a Manhattan bar (Tr. 84-86). This meeting took place on June 3, with DuBois again wearing the transmitting device. DuBois suggested that Goronsky's stepfather might be able to raise part of the money. The prior dealings with Battiloro and Goronsky were discussed and petitioner criticized them severely for failure to get their money "up front" (Tr. 93-136). The meeting was observed by two narcotics agents and a tape of the conversation between petitioner and DuBois was admitted in evidence (Tr. 179-185, 193-195, 198-203).

1. Petitioner's contention (Pet. 5) that a strike force attorney is not authorized to participate in grand jury investigations is the same contention rejected by the Eighth Circuit in *United States* v. *Wrigley*, 520 F. 2d 362, certiorari denied, No. 75-5284, November 17, 1975. There is no reason for further review here.

2. Petitioner claims (Pet. 6-8) that the evidence was insufficient to establish beyond a reasonable doubt his

guilt as to the substantive counts. But viewed most favorably to the government, *Glasser* v. *United States*, 315 U.S. 60, 80, the evidence supports petitioner's convictions on those counts. Petitioner's initial arrangements for the delivery of the heroin, its actual delivery, and his demands for its purchase price were sufficient to show his actual or constructive possession and his intent to distribute. See *United States* v. *Gomez-Rojas*, 507 F. 2d 1213, 1221-1223 (C.A. 5). Moreover, since petitioner's sentence on the conspiracy count was identical to and concurrent with the sentences on the substantive counts, further review of the evidence supporting the substantive counts is unnecessary. *Barnes* v. *United States*, 412 U.S. 837, 848.[3]

3. Petitioner argues (Pet. 9) that the trial court gave an improper instruction to the jury as to the possibility of the heroin having come from a source other than petitioner. In arguing his motion for judgment of acquittal, petitioner's counsel urged, as he has here, that the evidence failed to show that the heroin received by DuBois from petitioner was the same as that which the agent bought from Battiloro and Goronsky, and that there was not another supplier involved (App. 9a-15a). In discussing Counts 2 and 3, the court told the jury (App. 36a):

> Mr. Rosenkrantz pointed out it is possible the heroin which Battiloro and Goronsky sold to Agent Alleva was something that they got from another heroin dealer or that the packages that were analyzed by the chemists were not in fact the packages that Mr. Albanese delivered to Mr. DuBois. You can determine from the evidence whether this leaves you

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[3]The record does not support petitioner's assertion (Pet. 7) that the trial court had "grave misgivings" in submitting the substantive counts. See App. 11a-13a. The court later told the jurors that their verdict of guilty on all three counts was "probably the only verdict that is proper on the evidence" (App. 45a-1).

> with any reasonable doubt that the heroin that was purchased by the agent did in fact come from Mr. Albanese.
>
> In other words, it's possible to find the defendant guilty of conspiracy beyond a reasonable doubt and not guilty beyond a reasonable doubt of Count 2 or Count 3. That's for your determination.

Petitioner's counsel objected, pointing out that what he had said was to the court out of the presence of the jury and that he at no time conceded to the jury that petitioner had delivered any packages to Mr. DuBois. The court immediately called in the jury and told them (App. 43a):

> I have just one thing to add. I spoke about the possible defense that the packages analyzed by the chemist were not the packages delivered to Mr. DuBois. The defendant does not concede that any packages were delivered to Mr. DuBois by Mr. Albanese. That's for you to determine on the basis of all the evidence in the case.

There was no further objection. In view of the prompt correction, there was no reversible error. The short time during which the jury deliberated on its verdict, rather than being attributable to this incident, as petitioner argues (Pet. 10), more probably reflects the overwhelming proof of petitioner's guilt.

4. Petitioner contends (Pet. 11) that because there was no pre-sentence report, he is entitled to be resentenced and to be physically present during the resentencing. The facts as to the original sentencing are as follows:

Immediately after the verdict was returned the court inquired whether petitioner's bail should be continued. The prosecution argued that petitioner, who had been convicted of trafficking in narcotics, should be remanded

to custody; the defense argued that the risk of flight was minimal. The court decided that petitioner would remain on bail until sentencing, which would be expedited by not awaiting a pre-sentence report (App. 46a-50a).

At the sentencing hearing, at which petitioner and his counsel were present, the court dictated into the record its reasons for considering this an appropriate case in which to dispense with a pre-sentence report. It stated (S. Tr. 3-5[4]) that because of the age and illness of the chief government witness and because it intended to remand petitioner to custody pending appeal, the appeal should be expedited if possible. The court further stated that the testimony concerning petitioner at trial and the letters submitted by petitioner's attorney since trial gave it sufficient information about petitioner's character, apart from his role in selling heroin, and that, as the co-defendants had already been sentenced, comparative culpability was more important than personal characteristics in the circumstances of this case.

Rule 32(c)(1), Fed. R. Crim. P., provides that a pre-sentence report can be omitted if "the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing discretion, and the court explains this finding on the record." That is precisely what the court did here. Petitioner's contention (Pet. 11) that the sentencing without the report "was an empty gesture" is unsupported and is contradicted by the full and careful sentencing hearing. Petitioner's questioning of the efficacy of a subsequent motion under Rule 35, Fed. R. Crim. P., for reduction of sentence, does not alter the lawfulness of the proceedings.

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[4]"S. Tr." refers to the transcript of the sentencing proceeding, which we are lodging with the Clerk.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1976.